

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HAROLD A. HOLMAN
Claimant

VS.

GREIF BROTHERS CORPORATION
Respondent
Self-Insured

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) Docket Nos. 214,336 & 217,115
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ORDER

Claimant appeals from the November 26, 1997, preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

On appeal, claimant contends the Administrative Law Judge exceeded his jurisdiction in denying benefits because the evidence does establish that claimant's right hip injury arose out of and in the course of his employment with respondent in that the fall which caused the hip fracture resulted from claimant's knee giving way.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs of the parties, the Appeals Board finds, for preliminary hearing purposes, as follows:

The finding by the Administrative Law Judge that claimant has failed to meet his burden of proving personal injury to his right hip by accident arising out of and in the course of his employment should be affirmed. Respondent does not dispute that claimant sustained work-related injuries to his knees. Respondent contends, however, that claimant's fall and resulting right hip fracture is the result of a subsequent, intervening accident which most likely occurred when claimant tripped and fell over a garden hose and/or a plastic pop crate at a friend's home and that such hip injury is not the result of his knee giving way. Claimant also testified to having muscle weakness as a result of his diabetic condition.

The circumstantial evidence is contradictory concerning the cause of claimant's fall and resulting hip injury. There is evidence to suggest both a compensable claim for a consequence of the prior work-related knee injury as well as for a nonwork-related injury both in the lay witness testimony and in the medical records and reports in evidence. Thus, in this case, the issue of whether claimant suffered personal injury arising out of and in the course of his employment with respondent turns primarily on the credibility and believability of the witnesses. The Administrative Law Judge in this case had the opportunity to observe the demeanor and judge the credibility of the witnesses while they were testifying at the preliminary hearing. He apparently determined the testimony of claimant and Fred Hunter to be less credible and believable than the lack of any mention in the medical records of the knee giving out before the September 10, 1997, fall and in the initial histories given in the medical records after the fall. Furthermore, there is no expert medical opinion on causation, although the subsequent history claimant gave Dr. Bradley W. Bruner of the knee giving way caused Dr. Bruner to increase his functional impairment rating for the right knee. This could be viewed as an indication that Dr. Bruner considered the preexisting right knee injury to be the reason for claimant's fall. Dr. Bruner's October 2, 1997, medical record specifically refers to the fall that caused claimant's fractured hip. However, it is not clear whether Dr. Bruner was aware of the specific circumstances of that fall or whether he would attribute some or all of claimant's muscle weakness to claimant's diabetes mellitus.

Where the evidentiary record is conflicting, the Appeals Board takes into consideration an Administrative Law Judge's opportunity to personally observe the witnesses and will generally give deference to the findings concerning credibility. Based upon the Appeals Board's review of the record as a whole, we find the Order denying benefits to be appropriate and supported by the evidence.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the November 26, 1997, Order of Administrative Law Judge Jon L. Frobish should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
Kirby A. Vernon, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director